

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY
SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion for permission to proceed pro se, vacating the preliminary injunction and temporary restraining order, and directing disclosure of documents denied; defendant was represented by counsel; no motion for leave to withdraw; submissions did not establish entitlement to hybrid representation.

In *Renee Denton, individually and on behalf of Senix Acquisitions, LLC and on behalf of Senix Marine, LLC and Senix Acquisitions, LLC v. Dale R. Javino and Senix Marine, LLC*, Index No.: 464/2015, decided on Sept. 14, 2016, the court denied the motion purportedly appearing pro se for an order granting such defendant permission to proceed pro se, vacating the preliminary injunction and temporary restraining order, directing production of copies of the bank accounts for Senix Acquisitions, LLC and/or Senix Marine, LLC, and in the alternative immediately appointing a receiver of all company income and extend damages to defendant in the amount equal to any funds misappropriated and/or paid to plaintiff's attorneys in this matter.

The court noted that at the time the order to show cause was presented for signature, defendant Dale R. Javino was represented by counsel. The affidavit of Mr. Javino sworn to on April

28, 2016, did not state that he had discharged his attorney of record; only that he did not have the funds to pay him. The court also pointed out that the defendant's attorney did not move for leave to withdraw as counsel on the grounds that the fees were not paid, and that notice of defendant's purportedly pro se motion was not provided to his attorney of record. Moreover, the court stated that the submissions did not establish entitlement to hybrid representation. In light of the foregoing, the court denied the motion.

Motion for leave to serve late notice of claim granted; defendant with actual knowledge of the facts underlying the claim.

In *Katelynn R. Romano v. Long Island Power Authority and John F. Grant*, Index No.: 19416/2015, decided on March 3, 2016, the court granted the motion for an order granting the petitioner leave to serve a late notice of claim.

In determining whether to permit the service of a late notice of claim, the court will generally consider three factors: whether the movant has a reasonable excuse for the failure to serve a timely notice of claim; whether the public authority acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the public authority in its defense of the



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claim. Here, although the petitioner set forth no excuse for her prior counsel's failure to timely serve a notice of petitioner's claim. However, the court stated that the submissions reflected that LIPA had actual knowledge of the facts underlying the claim as its vehicle and employee

were directly involved in the accident, the accident was investigated by the Suffolk County Police Department, a police incident report generated, and its insurance carrier was notified of the occurrence. The court concluded that the petitioner demonstrated that LIPA was not substantially prejudiced by the late notice, and the defendant's submissions in opposition failed to rebut the showing. Accordingly, the motion for leave to serve a late notice of claim was granted.

Honorable Joseph C. Pastorella

Motion for an order staying a foreclosure sale and vacating their default; defendants seek additional time to pay their arrears but have not offered any excuse for their default or demonstrated the existence of a meritorious defense.

In *Board of Directors of Birchwood at Spring Lake Homeowners Association, Inc. v. Kenneth Simmons and Sandra Simmons, Midland Funding LLC a/p/o HSBC Bank Nevada NA, Dr. Lee Kurfist, RAB Performance Recoveries, LLC, Brookwood Coram I LLC, and John Doe and Jane Doe, being fictitious*

names and intended to be tenants or persons in possession and/or any other person who by bond, note, extension agreement or otherwise may be liable for deficiency judgment, if such deficiency judgment is desired and/or any party in possession of any part of the lien premises whose interest plaintiff desires to bar, Index No.: 4291/2014, decided on Oct. 13, 2016, the court denied the motion by defendants, Kenneth Simmons and Sandra Simmons for an order staying a foreclosure sale and vacating their default. In rendering its decision, the court noted that a defendant seeking to vacate a default pursuant to CPLR §5015(a) must demonstrate a reasonable excuse for the default and a meritorious defense to the action. Here, the defendants seek additional time to pay their arrears but have not offered any excuse for their default or demonstrated the existence of a meritorious defense. Accordingly, the motion was denied.

Motion dismissing counterclaims granted; motion to dismiss was denied without prejudice to the defendant to move for leave to amend her answer to assert lack of capacity as an affirmative defense.

In *David Friedman v. Christine Naccarato*, Index No.: 1094/2015, decided on Nov. 15, 2016, the court determined the motion by the defendant for an order dismissing the complaint and the motion by the plaintiff for an order of preclusion and to dismiss the defendant's counterclaims as

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follows: The plaintiff commenced the action for a constructive trust on real property.

The plaintiff alleged that he contributed to the purchase, which was placed in the defendant's name and he was promised that his name would be added to the title. The defendant asserted several counterclaims, including seeking payment for use and occupancy and conversion. The defendant now moves to dismiss the complaint on the grounds that the plaintiff received a discharge in bankruptcy in 2013 but failed to disclose any interest in the property. The plaintiff moved for summary judgment on the counterclaims and an order of preclusion for failure to comply with discovery.

In rendering its decision, the court noted that the failure to disclose an asset in a prior bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at that time, deprived the plaintiff of the legal capacity to sue on that claim. The defense of lack of capacity to sue must be raised in a pre-answer motion to dismiss or responsive pleading. Here, the defendant did not assert the lack of capacity to sue as an affirmative defense in her answer. Accordingly, the motion to dismiss was denied with-

out prejudice. The defendant was to move for leave to amend her answer to assert lack of capacity as an affirmative defense. In support of his motion, the plaintiff made a prima facie showing of his entitlement to summary judgment on the counterclaims. Accordingly, the motion was granted and the counterclaims were dismissed.

Motion and cross motion to dismiss granted; a mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll.

In *Ahmer Khan v. Pradecp Albert, M.D., Medical Arts radiology, medical Arts Radiological Group, P.C., Weining W. Liang, M.D. Xuemei He, FNP, Hui Zhang P.A., LNW Medical Office, PLLC*, Index No.: 604118/2015, decided on April 27, 2016, the court granted the motion and cross-motion by the defendants and the complaint was dismissed insofar as it was asserted against the moving defendants.

In support of the motion and cross-motion, the defendants submitted the pleadings, medical records and affidavits. The court concluded that the evidence was sufficient to make a prima facie, showing that all claims for malpractice arising from acts or omis-

sions taking place more than two and a half years before the action was commenced in April of 2015 were barred by the statute of limitations. The court noted that the alleged malpractice occurred in September of 2011.

Although the plaintiff continued to treat the defendants, his diagnosis, which is the basis of the suit, was in August of 2012. Thus, the court reasoned that the evidence demonstrated that the plaintiff was undergoing a course of treatment for his condition with other physicians and was continuing his relationship with the defendants as his primary care doctors. Finally, the court pointed out that a mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll.

Honorable William B. Rebolini

Notice to admit stricken in its entirety; defendants' discovery demands were overly broad; the appropriate remedy was to vacate the entire demand rather than to prune it.

In *Erin Petrocelli, as Executrix of the Estate of Mary E. McGovern v. General Motors, LLC, Cars Unlimited of Suffolk, LLC, Nesenger Chevrolet, Inc.*, Index No.: 17405/2014, decided on September 26, 2016, the court struck the defen-

dants' notice to admit in its entirety. In rendering its decision, the court reasoned that a notice to admit should not be used to call for legal conclusions or seek admissions as to material issues in a case. Where as here, defendants' discovery demands were overly broad, the appropriate remedy was to vacate the entire demand rather than to prune it. Accordingly, the notice was stricken.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale, concentrating her practice in matrimonial and family law, civil litigation and immigration matters.